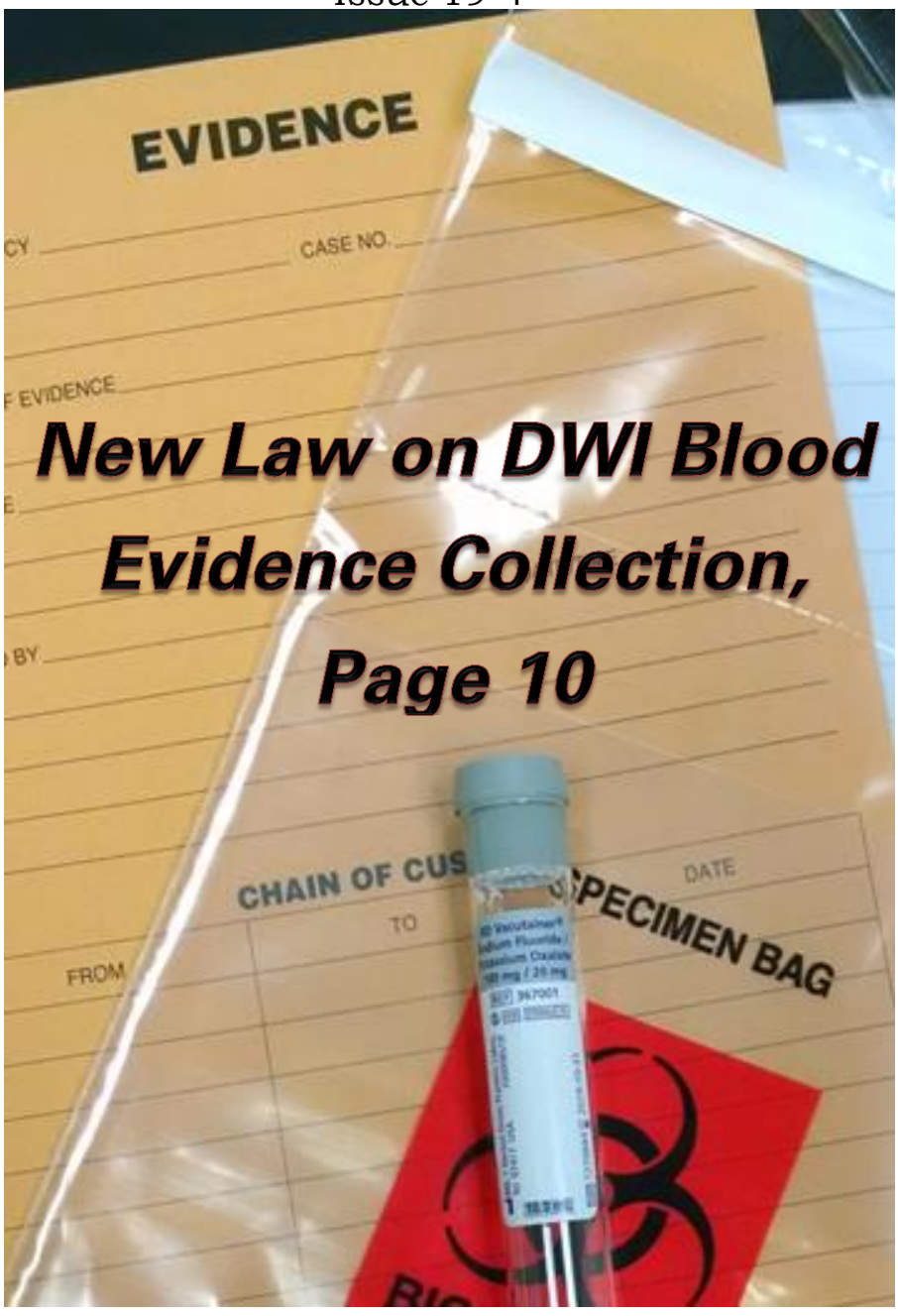
C.A.L.L.

City Attorney Law Letter

October 1, 2019
Issue 19-4



In This Issue:

City Attorney Law Letter
Springdale City Attorney's Office
201 Spring Street
Springdale, Arkansas, 72764

Editor – Hon. Ernest B. Cate, City Attorney

Contributing Authors:
Taylor Samples, Senior Deputy City Attorney
Sarah Sparkman, Deputy City Attorney
David Dero Phillips, Deputy City Attorney

Civil Rights – Criticizing Police is Constitutionally Protected

Thurairajah v. City of Fort Smith
No. 17-3419, 2019 U.S. App. LEXIS 16573
US Eighth Circuit Court of Appeals
June 3, 2019

While performing a routine traffic stop, an Arkansas State Trooper is interrupted by Thurairajah who drives by the stop in the opposite direction and yells "f**k you!" Thurairajah is stopped and arrested for disorderly conduct. The charges are subsequently dropped and this case was filed.

Facts.

> In 2015, Trooper Cross was performing a routine traffic stop on a van pulled to the shoulder of a busy five-lane highway in Fort Smith, Arkansas. From 50 feet away, Trooper Cross heard Thurairajah, who was driving by, yell "f**k you!" out of his car window. The van's occupants were a mother and her two young children. Thurairajah was driving at about 35 miles-per-hour on the far lane of the road moving in the opposite direction. Trooper Cross observed the two children in the van react to the yell. Trooper Cross ended the traffic stop of the van and pursued Thurairajah, stopped him, and arrested him, citing Arkansas's disorderly conduct law. Trooper Cross believed the shout constituted "unreasonable or excessive noise" under the law. Ark. Code Ann. § 5-71-207(a)(2).
>
> Thurairajah v. City of Fort Smith, No. 17-3419, 2019 U.S. App. LEXIS 16573, at *2 (8th Cir. June 3, 2019)

Law.

To substantiate the charge of Disorderly Conduct based on loud noise, the conduct in question must be substantially disruptive to legitimate activities in the vicinity.

"A warrantless arrest is consistent with the Fourth Amendment if it is supported by probable cause, and an officer is entitled to qualified immunity if there is at least 'arguable probable cause.' Thurairajah v. City of Fort Smith, No. 17-3419, 2019 U.S. App. LEXIS 16573, at *4 (8th Cir. June 3, 2019)

"A warrantless arrest, unsupported by probable cause, violates the Fourth Amendment.'" Id, at *7.

Analysis.

In this case, the Trooper elected to claim that the subject's speech was too loud. In Duhe v. City of Little Rock (reviewed in CALL, Fourth Quarter, 2018), the Eighth Circuit Court of Appeals examined the constitutionality of the Arkansas statute on Disorderly Conduct and specifically the area of noise disturbance. In that case, the Court upheld the constitutionality of

the unreasonable or excessive noise provisions of the statute. But the facts of the case which lead to affirmation of the violation were quite different. There, the electronically amplified chants of protestors created noise that was disruptive to the point that local establishments could not conduct their business.

The Duhe case was published after the events of this case, but no new law was created. For that reason, the Court denied the officer's claim that he could not have been on notice as to the existing law in 2015.

A profane shout is protected activity. The Court quoted Cohen v. California, 403 U.S. 15, 25, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) to support this, but numerous cases arrive at this same conclusion. This has long been the law and every police officer is on notice of this. In Cohen, a person wore a jacket to Court that had the words "F**K the Draft." Women and children present in the Court observed this, but no intent was shown to incite disorder.

Arrests for exercising protected rights, particularly for speech, have a chilling effect on that activity. Given that the officer was already on notice of this settled law, qualified immunity could not be extended in this case.

Prosecutor's Opinion.

This case does not necessarily mean that an officer must ignore all such intrusions while performing duties. It only means that any action taken by an officer must be reasonable and based on settled law. If we revisit the facts of the Thurairajah case, we find that many alternatives are possible. Unfortunately, the Courts are not in the habit of informing parties of how the case could have come out differently, so a degree of speculation is required for further analysis.

First, the officer, by necessity, must view how the interloper is affecting both vehicle and pedestrian traffic. Did the vulgar pause create a hazard to any other vehicles? Were any third parties inconvenienced or annoyed? Did the offender obstruct vehicle traffic in any way? Traffic stops and resulting citations based on any violation of the traffic code are the easiest areas of the law to substantiate, especially in light of the prolixity of traffic law, and even where the stop itself is pretextual.

Secondly, how did the intrusion affect the officer's ability to control the traffic stop he was already performing? Unfortunately, the law in this area is less supportive in such instances. Generally, close-in intrusion or some attempt to incite resistance, or disobedience must be shown for an interference-related charge to be considered.

Review by DCA David Dero Phillips.

Top of Document

Civil Rights – Deadly Force Case, Qualified Immunity Denied

Partridge v. City of Benton
No. 18-1803, 2019 U.S. App. LEXIS 19940
US Eighth Circuit Court of Appeals
June 3, 2019

A Benton Police officer shot and killed a 17 year old boy while responding to a call of a suicidal youth. The Federal District Court granted qualified immunity to the defendants. That ruling was challenged in the Court of Appeals.

Facts.

> On October 17, 2016, Keagan walked into the woods with a gun. His mother called 911. She said he ingested cough syrup and possibly marijuana, was depressed after being suspended from school earlier that morning, and threatened to shoot himself. She said he was not going to hurt anyone but himself. She repeated these facts to the first officer on the scene, explaining that Keagan was suicidal, walked into the woods with a gun, and (she believed) was going to try to hurt himself.
>
> Ellison was dispatched to help with the search. Using a police dog, he found Keagan standing 45 feet away on a riverbank. Ellison told Keagan to show his hands. Keagan turned slightly to his right. Ellison saw a gun in Keagan's right hand, drew his gun, and ordered Keagan to drop the gun. Without speaking, Keagan instead raised the gun to his right temple. Ellison commanded Keagan to drop the gun "several times." Keagan remained silent. As Keagan began moving the gun away from his head, Ellison fired three shots. Two hit Keagan, killing him.
>
> Partridge v. City of Benton, No. 18-1803, 2019 U.S. App. LEXIS 19940, at *2 (8th Cir. July 3, 2019).

Analysis.

The key circumstantial factors weighed by the appellate court were: 1) Keagan was not suspected of a crime, 2) He was not actively resisting arrest or attempting to flee and 3) He was armed, suicidal, and under the influence of cough syrup and possibly marijuana. Partridge v. City of Benton, No. 18-1803, 2019 U.S. App. LEXIS 19940, at *6 (8th Cir. July 3, 2019).

The defendants quoted a number of cases that held that employing deadly force against a suicidal and armed subject was reasonable. But in each case, the officers involved alleged that the gun was pointed at them or the barrel appeared to moving toward them.

In this case, the gun would have to move to comply with the officer's commands. The Court noted that no evidence was alleged in the pleadings as to the details of the movement that took place immediately prior to the shooting. "[T]he complaint does not allege that Keagan moved to aim his gun at Ellison. Nor is there an allegation that Ellison believed Keagan to be moving to aim at him." Partridge v. City of Benton, at *10. This deficiency was dispositive to the Court of Appeals.

The factual determination in the district court was that it would have "been nearly impossible for Ellison to tell whether Keagan was moving the gun away from his head to comply with Ellison's order or if he was repositioning the gun to aim it at the officers." Id at *5. It was this determination that defeated a grant of qualified immunity. By leaving this fact unresolved, the case had to progress.

Qualified immunity "shields government officials from liability when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id, at *3-4, Internal quotes omitted. For purposes of qualified immunity analysis, the Court must accept as true the facts in the complaint and draw all reasonable inferences in favor of the nonmoving party.

No evidence was provided by either party detailing the nature of the movement by the subject at the moment he was shot. This factual void made it equally possible that the decedent was in the process of complying with the officer's instructions when he was shot and killed. It is settled law that any use of force on a complying subject is unreasonable. This must be factually determined at trial.

The appellate court overturned the grant of qualified immunity. The case may proceed to jury trial, if not settled.

Deputy City Attorney Note:

Armed, intoxicated and suicidal individuals are an especially serious threat to law enforcement officers and to society in general. However, this case was more about adequacy of pleadings than the ultimate facts of the case. Without full knowledge of all evidence available to each side in this case, an independent third party cannot tell if more description in the pleadings would have led to a different result in this pre-trial adjudication. But, without a factual finding by the Court that an officer could have reasonably believed that the movement by the subject was threatening to the officer, qualified immunity could not be granted by law.

Review by DCA David Dero Phillips.

Top of Document

Search and Seizure/Civil Rights –Tow and Inventory Policy

United States v. Green

No. 18-1707, 2019 U.S. App. LEXIS 20729

US Eighth Circuit Court of Appeals

June 12, 2019

An officer encountered a disabled car in a road intersection and subsequently ordered it towed. During the inventory search, methamphetamine and paraphernalia were discovered. The occupant of the vehicle alleged the evidence was collected in violation of the US Constitution.

Facts.

> On the morning of September 4, 2014, Grandview, Missouri Police Officer Andrew Bolin answered a call about a suspicious person at 14700 Pine View Drive. When he arrived on the scene, Officer Bolin found Green asleep in the driver's seat of a 1996 Saturn sedan with its hood and trunk open. The car was parked in front of a stop sign near a busy residential intersection. Officer Bolin ran the license plate. The plate came back associated with a 1988 Oldsmobile and was registered to a Katherine Gooch in Boonville, Missouri.
>
> Green awoke and explained to Officer Bolin that he was staying at a nearby motel and that his car had broken down the night before. When Officer Bolin asked for his driver's license, Green produced only an identification card. Officer Bolin confirmed with dispatch that Green did not have a valid driver's license. Dispatch also informed him that Green was on supervision following convictions for burglary and possession of a controlled substance and was known to be armed.
>
> Officer Bolin asked Green for consent to search the car. Green declined. Green told him that his girlfriend, Katherine Gooch, owned the car, and provided [*3] a phone number, but he then said that the number belonged to a different girlfriend. Officer Bolin decided to have the car towed because the car was disabled on a public roadway, blocking an intersection, with improper license plates, and Green did not have a valid driver's license even if the car would have started.
>
> Green wanted to remove some of his property from the car, but Officer Bolin would not release any property that was not clearly identifiable as belonging to Green. Officer Bolin issued Green two traffic citations and informed him that he was free to go. Officer Bolin conducted an inventory search and found a zip pouch containing $500, a bubble pipe, and a baggie containing about three grams of methamphetamine. He also found two more bags containing 387 grams of methamphetamine. Green was arrested and later indicted for possession with intent to distribute methamphetamine. He filed a motion to suppress the evidence discovered during the inventory search.

United States v. Green, No. 18-1707, 2019 U.S. App. LEXIS 20729, at *2-3 (8th Cir. July 12, 2019)

Law.

"The central question in evaluating the propriety of an inventory search is whether, in the totality of the circumstances, the search was reasonable." ... An inventory search is reasonable if it is "conducted according to standardized police procedures," because doing so "vitiate[s] concerns of an investigatory motive or excessive discretion. United States v. Green, at *5-6, internal cites omitted.

"[P]olice may exercise discretion to impound a vehicle, 'so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity.'" This requirement "ensure[s] that impoundments and inventory searches are not merely 'a ruse for general rummaging in order to discover incriminating evidence.'" Id.

Analysis.

In this case, The Defendant/Appellant, Green, was arguing that the officer did not follow the correct provision of his department's tow policy and that the officer should have allowed Green to arrange for towing himself. The US Eighth Circuit Court of Appeals identified seven factors which supported the officer's decision to tow the car: "(1) the car was illegally parked in the lane of traffic; (2) the car's presence created a public safety hazard by impeding traffic; (3) the car was disabled and could not move on its own power; (4) vehicles approaching the intersection behind the car were forced to drive in the opposing lane of traffic to avoid hitting it; (5) the car's license plates were registered to another vehicle, in violation of the law; (6) Green did not possess a valid driver's license; and (7) Green had ostensibly been there for hours and had not arranged for the car's removal." Id at *7-8.

The Court acknowledged that, though poorly written, the policy was sufficiently clear to prevent impoundment and tow based on "investigatory curiosity rather than public safety" but still afforded discretion to officers making the decisions in the field. "The decision to impound a vehicle need not "be made in a 'totally mechanical' fashion" because "[i]t is not feasible for a police department to develop a policy that provides clear-cut guidance in every potential impoundment situation." Id at *12.

The Court also held that the vehicle would have been towed in any event and that Green's presence with the car did not change the necessity of the tow. Green acknowledged at the scene that he was not the actual owner of the vehicle. The rightful owner could not be quickly contacted.

As investigation was not the sole purpose behind the decision to tow and impound, the impoundment and subsequent inventory search were upheld as valid. The conviction was affirmed.

Prosecutor's Note.

The issue of vehicle ownership versus possession of the vehicle's contents was not an issue in this case, likely because much settled law exists to define the difference. In this case, the vehicle owner was not present. Defendant/Appellant Green was the sole occupant of the vehicle when it was discovered blocking traffic. Everyone agreed that Green was not the owner of this inoperative vehicle, yet he was charged with possession of the materials inside. Additionally, Green was not allowed to arrange for removal of the vehicle, as he was not the owner.

The distinction between ownership and possession in Arkansas Law regarding vehicles is statutorily defined and ample case law further clarifies that distinction. Vehicles are highly regulated by the state. They are certificated property and must be registered with the state to operate on public roads. Where reasonable suspicion exists that a vehicle or operator is in noncompliance with any requirement for operation on a public roadway, the vehicle may be stopped and detained for investigation of the suspected violation. If the violation is confirmed, the vehicle may be released upon correction of the violation, or may be impounded where legal operation cannot be attained. If a vehicle must be moved and where an operator cannot satisfactorily prove ownership or property rights, the state is responsible to safeguard the property through impoundment until the rightful owner or the owner's lawful representative reclaims the property and restores it to lawful operation.

Possession is merely control or the ability to control the environment, whether lawful or not. Constructive possession occurs when the item and the possessor are not physically connected but the item in question is under the "dominion and control" of the constructive possessor. This is usually established by circumstantial evidence. In cases involving multiple parties, something more than physical presence is required to show constructive possession.

> "[J]oint occupancy of a vehicle, standing alone, is not sufficient to establish possession or joint possession. There must be some other factor linking the accused to the drugs. ... Other factors to be considered in cases involving automobiles occupied by more than one persons are: (1) whether the contraband is in plain view; (2) whether the contraband is found with the accused's personal effects; (3) whether it is found on the same side of the car seat as the accused was sitting or in near proximity to it; (4) whether the accused is the owner of the automobile, or exercises dominion and control over it; and (5) whether the accused acted suspiciously before or during the arrest."

Jones v. State, 357 Ark. 545, 551, 182 S.W.3d 485, 488 (2004) (internal cites omitted).

In this case, Green acknowledged operation of the vehicle and was the only occupant when discovered. Constructive possession over all the vehicle's contents was more than established by admission of the party.

The essence of Green's argument on appeal was that the police didn't give him a better chance to hide evidence of his crimes. The Court held that he was not entitled to that opportunity.

Review by DCA David Dero Phillips.

Top of Document

Search and Seizure – DWI Blood Evidence

Supreme Court of United States Holds Admissible Warrantless Blood Draw of Unconscious Drunk Driver Under Exigency Exception to Fourth Amendment

Mitchell v. Wisconsin

FACTS TAKEN FROM THE CASE

Alexander Jaeger, a police officer in Wisconsin, received a report that Gerald Mitchell appeared to be very drunk before driving off in a vehicle. Officer Jaeger soon thereafter found Mitchell wandering near a lake, stumbling and slurring his words, and hardly able to stand. Mitchell registered a BAC level of .24% on a portable breath test. Mitchell was arrested for DWI and driven to the police station, but Mitchell was too lethargic for a breath test by the time the police car reached the station. Officer Jaeger drove Mitchell to a nearby hospital for a blood test, but Mitchell lost consciousness on the way and had to be wheeled in. Officer Jaeger read aloud to a slumped Mitchell the standard statement giving drivers a chance to refuse BAC testing. Hearing no response, Officer Jaeger asked hospital staff to draw a blood sample. Mitchell remained unconscious while the sample was taken, and analysis of the blood showed that his BAC level was .222%.

Mitchell moved to suppress the results of the blood on the ground that it violated his Fourth Amendment right against unreasonable searches because it was conducted without a warrant. The State of Wisconsin responded by saying that its implied consent law, together with Mitchell's free choice to drive on its highways, rendered the blood test a consensual one, thus curing any Fourth Amendment problem. The trial court denied Mitchell's motion to suppress, and Mitchell was convicted of DWI.

ARGUMENT AND DECISION BY THE SUPREME COURT OF THE UNITED STATES

The Supreme Court of the United States granted certiorari to decide whether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement.

In summarizing its previous holdings, the Court said that it has already addressed what officers may do in two broad categories of cases. First, an officer may conduct a BAC test if the facts of a particular case bring it within the exigent-circumstances exception to the Fourth Amendment's general requirement of a warrant. Second, if an officer has probable cause to arrest a motorist for drunk driving, the officer may conduct a breath test (but not a blood test) under the rule allowing warrantless searches of a person incident to arrest. Addressing the facts presented above, the Court said that it now considers what a police officer may do in a narrow but important category of cases: those in which the driver is unconscious and therefore cannot be given a breath test. The Court held that in such cases, the exigent-circumstances rule almost

always permits a blood test without a warrant. When a breath test is impossible, enforcement of the drunk driving laws depends upon the administration of a blood test. And when a police officer encounters an unconscious driver, it is very likely that the driver would be taken to an emergency room and that his blood would be drawn for diagnostic purposes even if the police were not seeking BAC information. Also, police officers most frequently come upon unconscious drivers when they report to the scene of an accident, and under those circumstances, the officers' many responsibilities – such as attending to other injured drivers or passengers and preventing further accidents – may be incompatible with the procedures that would be required to obtain a warrant. Thus, when a driver is unconscious, the Court concluded that the general rule is that a warrant is not needed.

For its reasoning, the Court referenced its past decisions. The Court noted that in Birchfield v. North Dakota, 579 U.S. __ (2016), in the context of a search incident to arrest exception to BAC testing of conscious drunk driving suspects, it held that the drunk driving arrest, taken alone, justifies warrantless breath tests but not blood tests, since breath tests are less intrusive, just as informative, and in the case of conscious suspects readily available. Furthermore, the Court noted that in Missouri v. McNeely, 569 U.S. 141, 149 (2013), it held that the exigent circumstances exception which allows warrantless searches to prevent the imminent destruction of evidence did not apply simply because blood alcohol evidence is always dissipating due to natural metabolic processes; that is, the fleeting quality of BAC evidence standing alone is not enough to justify a warrantless search. However, the Court pointed-out that in Schmerber v. California, 384 U.S. 757 (1966), it held that a warrantless blood test of a drunk driver was justified when the driver had gotten into a car accident that gave police other pressing duties, for further delay caused by warrant application in this context really would have threatened the destruction of evidence. The Court stated that like the situation presented in Schmerber, the facts of Mitchell's arrest and subsequent blood draw sit much higher on the exigency spectrum than those presented in McNeely. McNeely was about the minimum degree of urgency common to all drunk driving cases. In Schmerber, a car accident heightened that urgency, and in this case Mitchell's medical condition did just the same.

The Court stated that the important question is what officers may do when a driver's unconsciousness or stupor eliminates any reasonable opportunity for the breath test that is given at the police station or other appropriate facility. The Court stated that highway safety is a vital public interest; that when it comes to promoting highway safety, federal and state lawmakers have long been convinced that specified BAC limits make a big difference; that enforcing BAC limits obviously requires a test that is accurate enough to stand up in court; that enforcement of BAC limits required prompt testing because it is a biological certainty that alcohol dissipates from the bloodstream at a rate of 0.01 percent to 0.025 percent per hour; and that when a breath test is unavailable to promote those interests, a blood draw becomes necessary. The Court concluded that in the case of unconscious drivers, who cannot blow into a breathalyzer, blood tests are essential for achieving the compelling interests described above; there is clearly a

compelling need for a blood test of drunk driving suspects whose condition deprives officials of a reasonable opportunity to conduct a breath test.

In summary, the Court stated that exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Both conditions are met when a drunk driving suspect is unconscious, and with such suspects, a warrantless blood draw is lawful. Unconsciousness does not just create pressing needs; it is itself a medical emergency, one where a suspect will have to be rushed to the hospital or similar facility not just for the blood test itself but for urgent medical care. Such a driver may require monitoring, positioning, and support on the way to the hospital, and his blood may be drawn anyway for diagnostic purposes. The immediate medical treatment needed by the suspect could delay or distort the results of a blood draw later conducted upon receipt of a warrant, thus reducing its evidentiary value. Just as the ramifications of a car accident pushed Schmerber over the line into exigency, so does the condition of an unconscious driver bring his blood draw under the exception. All the rival priorities officers must deal with when confronted with an accident or unconsciousness would force them into a dilemma, making officers choose between prioritizing between a warrant application, to the detriment of critical health and safety needs, and delaying the warrant application, to the detriment of its evidentiary value. This is just the kind of scenario for which the exigency rule was born, and just the kind of dilemma it lives to dissolve. When police have probable cause to believe a person has committed a drunk driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment.

Case: This case was decided by the Supreme Court of the United States on June 27, 2019, and was an appeal from The Supreme Court of Wisconsin. The case citation is Mitchell v. Wisconsin, 139 S. Ct. 2525 (2019).

Review by SDCA Taylor Samples

Top of Document

Arkansas Eviction Law in Plain English:
Frequently Asked Questions with Answers

"I need to evict my tenant."
"My ex-girlfriend won't move out!"
"I'm going to call the sheriff to get these renters out!"

You've probably heard statements like these from citizens. What do you tell someone who wants to evict a tenant?

The short answer is "Contact a private attorney." This article will explain why this is the proper answer. Please note that this is not an exhaustive analysis on eviction law in Arkansas but rather a primer for context.

Eviction Statute

There is only one procedure in Arkansas that a landlord can use to evict their tenant – the Unlawful Detainer statute found at Ark. Code Ann. §18-60-304, *et al*.

An Unlawful Detainer action is filed as a lawsuit. In this lawsuit, a landlord must sue the tenant to have them removed from the property and/or pay back rent and damages. If the landlord follows all the steps required in this type of lawsuit, the tenant may be removed from the property with the assistance of the sheriff's department.

Where can this case be filed?

An Unlawful Detainer action must be filed in Circuit Court, no exceptions. It cannot be filed as a small claims case in District Court. However, a landlord cannot go to Washington County Courthouse and ask for the paperwork. The City Attorney's Office does not have this paperwork, either. The landlord will need to contact a private attorney about how to file this type of lawsuit, as there are several steps the landlord must take to have a tenant removed from the property.

What is the process for eviction?

It is not your job to explain the eviction process to a citizen. However, for your own knowledge, this is generally how an eviction action works:

1. The landlord serves the tenant a notice to leave the property. If the reason for eviction is non-payment of rent, the tenant will have three days to leave the property. If the eviction is for any other reason besides non-payment of rent, this time will vary.
2. If the tenant does not leave the property, the landlord will file an action for Unlawful Detainer in Circuit Court. Along with the complaint for Unlawful Detainer, the landlord will usually file a document called Notice of Intent to Issue a Writ of Possession.
3. The landlord will have someone, usually a process server, serve the complaint and notice to the tenant.
4. The tenant has five days to file a written objection with the Circuit Court Clerk.

5. If the tenant does not file a written objection, the Circuit Clerk may issue a Writ of Possession, and the Sheriff's department may assist the landlord in recovering the property.
6. If the tenant does file a written objection, the court will have a hearing to see who gets possession of the property while the lawsuit is ongoing.
7. Regardless of who is given rights to the property during the pendency of the lawsuit, both parties have a right to trial on the merits so long as all parties file the proper paperwork according to state law.

What if there is not a written contract?

A contract does not have to be written to be valid. If money or services have exchanged hands in exchange for a place to live, there is a contract.

Can the landlord remove property and lock the doors if the tenant refuses to leave?

No; they must follow the Unlawful Detainer process. See Gorman v. Ratliff, 289 Ark. 332 (1986).

What about the Criminal Trespass statute?

The Criminal Trespass statute, Ark. Code Ann. §5-29-203, should not be used to remove a tenant from the property. See Williams v. Pine Bluff, 284 Ark. 551 (1985).

What if the property owner wants to kick someone out (a family member, an ex-girlfriend, etc) who had permission to live there for an extended period of time but didn't pay rent?

The recommended course of action is to advise the property owner to contact a private attorney. There may be other factors to consider which may give a property interest to the guest or invitee. See generally Polk v. State, 28 Ark. App 282 (1989) and Poole v. State, 244 Ark. 1222 (1968).

What if the home is abandoned and a person is there without permission?

The person in the home is neither a tenant nor an invitee. The Criminal Trespass statute applies to this scenario.

What if the tenant didn't pay rent because the landlord didn't make repairs to the property?

Arkansas does not require landlords to provide safe and habitable residences. See E.E. Terry v. Helena & West Helena, 256 Ark. 226 (1974), and Delaney v. Jackson, 95 Ark. 131 (1910). While a failure to make repairs may be a city code violation, it does not relieve the tenant of their obligation to pay rent.

The only time a tenant can be relieved of their obligation to pay rent for failure to make repairs is if the lease explicitly states that the tenant may do that.

What about the 10-day notice from the City Attorney's Office?

The Springdale City Attorney's office **does not and has never evicted tenants**. There is a Failure to Pay Rent/Vacate statute at Ark. Code Ann. § 18-16-101, but this is not an eviction action. A tenant who fails to pay rent and refuses to leave after being served a 10-day notice may be charged with a criminal violation. The maximum penalty is a fine of $25. The landlord must sign an affidavit with the City Attorney's Office to have this charge brought forward. However, neither the City Attorney's Office nor the court can order someone to be removed from the property. **The only time you should cite someone with Failure to Pay Rent/Vacate is if a summons has been issued by the City Attorney's Office, and Failure to Pay Rent/Vacate is NEVER an arrestable offense**.

What if the landlord or tenant has other questions about their rights?

Direct them to contact a private attorney. If they cannot afford an attorney, they may be able to get assistance from Legal Aid of Arkansas, depending on the circumstances. The City Attorney's Office does not provide legal advice to citizens.

Review by DCA Sarah Sparkman

Top of Document